IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

IN RE	)	
	)	**NO. 96-12406**
RICHARD ALTON NOLAN	)	
JANE ELLEN NOLAN	)	
	)	
Debtors	)	**Chapter 7**
	)	
	)	
RICHARD ALTON NOLAN	)	
	)	
Plaintiff	)	
	)	
v.	)	**ADV. NO. 96-1216**
	)	
UNITED STATES OF AMERICA	)	
BY AND THROUGH THE INTERNAL	)	
REVENUE SERVICE	)	
	)	
Defendants	)	
		[ENTERED: 4-28-97]

M E M O R A N D U M

This adversary proceeding is before the court upon the plaintiff's complaint seeking a determination from the court that plaintiff's income taxes for the tax years 1984 through 1987 are dischargeable. The defendant, Internal Revenue Service, argues the taxes are exempted from discharge because the plaintiff did not file form 1040 tax returns for those years. The plaintiff contends that he did file a return because he signed an IRS Form 5564, Notice of Deficiency-Waiver, which he mailed to the IRS on February 1, 1991, and that he allegedly signed other documents at the request of the IRS during a meeting with an IRS agent in March 1992. Mr. Nolan contends that the Notice of Deficiency-Waiver and

other documents he signed constitute a tax return and that his taxes are dischargeable. Having considered the evidence introduced in this proceeding, together with the arguments and briefs of counsel, the court now enters its findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

I.

The plaintiff did not file a form 1040 tax return for tax years 1984 through 1987. During those years the plaintiff worked as a carpenter for several different employers. Because no returns were filed by the plaintiff, the IRS prepared a substitute for returns pursuant to Section 6020(b) of the Internal Revenue Code for the years in question. The IRS then computed the amount of taxes due from the plaintiff by examining its own records which consisted primarily of Form 1099's received from plaintiff's several employers.

In January 1991, the IRS sent the plaintiff a Notice of Deficiency. The Notice stated the amounts due for 1984 through 1987, as computed by the IRS. Accompanying the Notice was an IRS Form 5564, Notice of Deficiency-Waiver. The plaintiff executed the Form and mailed it to the IRS on February 1, 1991. By executing Form 5564, the plaintiff agreed to the immediate assessment and collection of the deficiencies computed by the IRS. Together with Form 5564 the plaintiff sent a handwritten letter to the IRS that stated the plaintiff had no records to deny the tax computations

made by the IRS. The letter also requested that the IRS set up a monthly repayment plan for the plaintiff.

Over a year later, on March 13, 1992, the plaintiff met with IRS revenue agent Ben McBain. Mr. McBain is a revenue officer who works in the IRS collection division in Chattanooga, Tennessee. Mr. McBain's duties include collecting taxes, getting information for tax collection purposes, and seizing assets for tax collection purposes. As a collection officer, he is not responsible for preparing substitute returns nor is he responsible for conducting audits. During the meeting with Mr. McBain, the plaintiff went over the Notice of Deficiency calculated by the IRS which the plaintiff had received in January 1991; he provided Mr. McBain with a list of employers that the plaintiff was able to recall from memory; and he gave Mr. McBain information about his current income and expenses so that a repayment schedule could be worked out. From a description of the meeting by the plaintiff and from a description of Mr. McBain's job responsibilities, it appears that the meeting between the plaintiff and Mr. McBain was primarily for the purpose of arranging a repayment schedule for the collection of the taxes that had been assessed by the IRS a year earlier.

Although the plaintiff testified he signed other IRS documents, in addition to the Waiver Form, the plaintiff's IRS file, which was reviewed by Revenue Officer Constance Little, did not contain any other executed documents by the plaintiff. Hence there are no documents in evidence, other than the Form 5564

executed by the plaintiff, that can be construed as plaintiff's tax returns.

The plaintiff testified that Mr. McBain did not ask him to file tax returns for the tax years in question nor did the IRS send him any request for tax returns.

II.

When a taxpayer has failed or refused to file a proper return, the IRS may prepare a substitute return from information it can acquire and then treat the substitute return as the official return for the year in question. Title 26, United States Code § 6020(b) provides:

> (1) Authority of Secretary to execute return. - If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
>
> (2) Status of returns. - Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

In this case it appears that the Secretary prepared a substitute return with no assistance from the debtor under § 6020(b). The cases are virtually unanimous in holding that such a substitute return does not qualify as the kind of return a debtor

must have filed in order to escape the effect of 11 U.S.C. § 523(a)(1)(B)(i), which prevents the discharge of taxes for which returns were not filed. *Bergstrom v. United States (In re Bergstrom)*, 949 F.2d 341, 343 (10th Cir. 1991); *Rank v. United States (In re Rank)*, 161 B.R. 406, 409 (Bankr. N.D. Ohio 1993) (collecting cases). Moreover, a debtor may not escape the consequences of § 523(a)(1)(B)(i) by showing that the IRS did not specifically request or direct that the debtor file a return. Nothing in the statute requires notice to the debtor of his filing obligation.

The plaintiff relies primarily on *Carapella v. United States (In re Carapella)*, 84 B.R. 779 (Bankr. M.D. Fla. 1988), wherein the court held that, under 26 U.S.C. § 6020(a), the debtor's signing of IRS form 870, coupled with the fact that the "Government already possessed sufficient information to determine the tax liability of the Debtor," *id.* at 782, was enough to permit treatment of the form 870 as a return for purposes of the Bankruptcy Code's discharge provisions. This decision is criticized in *Gushue v. Internal Revenue Service (In re Gushue),* 126 B.R. 202, 204 (Bankr. E.D. Pa. 1991), as a "deviation" from the majority rule, and the *Gushue* court refused to follow it and held that substitute returns prepared and filed by the Secretary under § 6020(b) were not tax returns for purposes of 11 U.S.C. § 523. This court agrees with *Gushue* and thus will not follow *Carapella*. *Carapella* purports to be decided under § 6020(a) and Revenue Ruling 74-203, which

construes § 6020(a) but does not pertain to §6020(b). The court in *Carapella* believed that the Revenue Ruling's requirement of "accompanying schedules" could be made up for by the fact that IRS "already possessed sufficient information. . ." to determine tax liability in Carapella's case. This court disagrees because it believes that IRS' possession of information about the taxpayer is irrelevant to determining whether the debtor filed a return for purposes of § 523(a)(1)(B)(i). It might be that IRS, through outside sources, knew everything there was to know about a hypothetical taxpayer's financial situation and tax status. Without more, that would not mean that the taxpayer had filed a return, even though he might have signed some procedural form in the course of his dealings with IRS.

The plaintiff also relies on *Lowrie v. United States (In re Lowrie)*, 162 B.R. 864 (Bankr. D. Nev. 1994), in which the court held that the taxpayer's cooperation with IRS in signing a form 1902-B upon IRS representations that it would serve as a substitute tax return was sufficient to constitute a return under 26 U.S.C. § 6020(a). The facts in the *Lowrie* case are distinguishable from the facts here. In the instant case, the IRS prepared the substitute returns for the plaintiff under 26 U.S.C. § 6020(b), not from information provided by the plaintiff, but from information received from third parties. The only document in evidence signed by the plaintiff was the Form 5564 which cannot be considered a tax return. Moreover, there is nothing that occurred during the

meeting the plaintiff had with the IRS collections officer over a year after the assessment of the taxes that the court can reasonably construe as constituting the filing of a return by the plaintiff. Hence, because the facts in *Lowrie* are different from those in the case at bar, and because it is a § 6020(a) case, *Lowrie* is not applicable here.

Accordingly, the court must conclude that the plaintiff failed to file tax returns for the tax years 1984 through 1987 and that the taxes for those periods are not discharged in the plaintiff's bankruptcy case. An appropriate order will enter.

JOHN C. COOK
United States Bankruptcy Judge